NO. 56539-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ASHLEY LEMAY,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES,

Respondent.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

JULIE A. TURLEY
Assistant Attorney General
WSBA #49474
Office of the Attorney General
1250 Pacific Avenue, Suite 105
PO Box 2317
Tacoma, WA 98401
(253) 593-5243
Julie.Turley@atg.wa.gov
OID #91117

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I. INTRODUCTION

One day at school, C.A. paced the sensory room. He was quiet, nervous, and fidgety. He confided to the room staff supervisor that his brother, K.A., was sick—but not really sick. Rather, K.A. did not want to come to school out of fear that people would ask questions about the scratches on his face.

C.A.'s disclosure set off a Child Protective Services (CPS) investigation into these children's safety. To the CPS investigator, C.A. disclosed that their mother, Ms. Lemay, had caused K.A.'s injuries with a belt after he yelled and slammed a door. K.A. relayed the same version of events to the investigator, and did so again at a forensic interview. However, K.A. later changed his story, claiming that he scratched his face falling out of a tree into a bush—a story Ms. Lemay denied could be true.

The Department of Children, Youth, and Families (Department) found that Ms. Lemay physically abused K.A. She appealed, and the case proceeded to an administrative hearing. The Administrative Law Judge (ALJ), upheld the Department's

finding. The ALJ's decision was upheld again by the Board of Appeals (BOA) and the Superior Court. Ms. Lemay now appeals to this Court.

The BOA's final order should be affirmed. The reviewing judge properly applied the hearsay rules applicable in administrative hearings. Although neither party called C.A. as a witness at the hearing, everyone agreed that C.A. is truthful. K.A. testified at the hearing, allowing Ms. Lemay to cross-examine him. The BOA final order weighed the evidence and made credibility determinations to decide which of K.A.'s version of events was true.

That Ms. Lemay disagrees with the BOA's analysis is not a sufficient basis to overturn the decision. The final order is supported by admissible, substantial evidence that the BOA was entitled to rely upon. Ms. Lemay cannot show that the BOA overlooked evidence such that the decision was arbitrary and capricious. Because she cannot meet her burden to overturn the agency's decision, it should be affirmed.

II. RESTATEMENT OF THE ISSUES

1. Did the reviewing judge properly consider hearsay evidence from C.A. and K.A. where C.A.'s credibility was undisputed, Ms. Lemay could have called C.A. as a witness, and Ms. Lemay received a full opportunity to cross-examine K.A. when he testified.

2. Did the BOA affirm Ms. Lemay's finding of physical abuse based on substantial evidence where it properly considered hearsay statements from the children who reported that Ms. Lemay caused K.A.'s injuries, which were visible and testified to by multiple witnesses, and even Ms. Lemay denied that those injuries could have been caused by K.A.'s alternate explanation?

3. Was the BOA's ruling arbitrary or capricious where the reviewing judge carefully considered all relevant facts when making his credibility determinations?

III. COUNTERSTATEMENT OF THE CASE

C.A. and K.A. are brothers, the children of Ms. Ashley Lemay, their mother, the appellant here.[1] CP at 14, 17 (Finding of Fact (FOF) 4.9, 4.22). This family came to the attention of CPS on a phone call from the children's school after C.A. reported his brother did not come to school because K.A. "had scratches all over his face." CP at 13-14 (FOF 4.6, 4.8).

C.A. had come to the sensory room, which was supervised that day by Ms. Carrie Taylor.[2] CP at 13 (FOF 4.4). Ms. Taylor observed C.A. to be quiet, nervous, and fidgety. CP at 538. C.A. paced back and forth from one chalkboard to the other. CP at 538-39. Upon observing C.A.'s demeanor, Ms. Taylor asked

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[1] The children's father is Shaheen Al-Safran. The Department also issued separate findings of neglect to Mr. Al-Safran, however, the Administrative Law Judge (ALJ) did not affirm that finding.

[2] The sensory room is a designated space designed for children who may need to get the "wiggles out" due to having extra energy. CP at 528. Children who have a special need diagnosis such as having ADHD or autism, have been disrupting the classroom, or exhibiting behavioral issues qualify to spend time in the sensory room. *Id*.

C.A. if he was okay. CP at 541. C.A. said K.A. was sick "[b]ut he's not really sick" and that "[h]e just doesn't want to come to school," to be teased and have people asking questions. CP at 541, 545-47. C.A. said K.A. was at home because he has "scratches all over his face." CP at 546.

Ms. Taylor, as a mandated reporter, immediately reported C.A.'s disclosure to school counselor Jill Smith, who initiated the phone call to CPS. CP at 530-31, 546-47, 574, 578, 627-28, 632. Ms. Taylor recounted to CPS what C.A. had disclosed to her. CP at 547. After making the call to CPS, neither Ms. Taylor nor Ms. Smith spoke with either K.A. or C.A. regarding C.A.'s disclosure. CP at 582, 633.

On two separate occasions after C.A.'s disclosure, both Ms. Taylor and Ms. Smith saw scratches on K.A.'s face. CP at 547-49, 634-36. Ms. Taylor, a couple days after C.A.'s disclosure, saw scratches on both sides of K.A.'s cheeks. CP at 548-49, 572-73. The scratches were "very visible" on his face. CP at 570, 572. The scratches were dark in color, deep, and were

in various stages of healing. CP at 548. Some scratches had scabs. CP at 548. Likewise, shortly after initiating the call to CPS and in her subsequent contact with K.A., Ms. Smith noticed multiple linear marks on the left side of K.A.'s face. CP at 635-36.

The day after Ms. Smith's call to CPS, Jessica Chavez, the assigned CPS investigator, spoke with K.A. at the children's school. CP at 765, 771, 776-77. Ms. Chavez sat at a table with K.A. and they spoke for less than an hour. CP at 780-81. K.A. was quiet, reserved, and fidgety. CP at 781. Ms. Chavez observed marks on both sides of K.A.'s face and along his hairline. CP at 781. The marks on K.A.'s face were an inch-and-a-half-each and were red in color with a little shade of purple. CP at 781-82.

Ms. Chavez asked K.A. how he got the scratches on this face. CP at 782-83. K.A. gave inconsistent and incomplete accounts of what happened to him. CP at 783. When asked about his injuries, K.A. initially said that he "fell out of a tree" and then

"fell into a bush." CP at 783. However, later in the interview, K.A. said that he "walked and tripped into a bush." CP at 783.

Ms. Chavez then spoke to C.A. after speaking with K.A. CP at 786. C.A. was soft spoken, friendly, and nervous during the interview. CP at 787. C.A. said that over the weekend K.A. had gotten in trouble when he was upset because he did not get to eat breakfast first. CP at 788, 790-91. C.A. said Ms. Lemay asked both him and K.A. to guess a number between one and 100 and whichever of them was closest would determine who would get to eat breakfast first, and that he won. CP at 791. In response, K.A. stomped off to his bedroom and slammed his bedroom door. CP at 788, 790-91. Ms. Lemay was upset with K.A. for slamming the door and followed K.A. to his bedroom with a belt. CP at 791. When C.A. saw his brother again, K.A. had marks on his face, which were visible only after Ms. Lemay had gone into his room with the belt. CP at 793.

Based on the information collected, Ms. Chavez staffed the case with her immediate supervisor and a determination was

made to place the children into protective custody. CP at 794, 798. Ms. Chavez returned to the children's school that same day to inform the principal that both children were being placed into the State's custody. CP at 798-99. Ms. Chavez, along with the children and Ms. Smith, were in a meeting room in the main office. CP at 803. C.A. was crying while K.A. simply stared across the table. CP at 804. K.A. kept repeating that "it was [C.A.]'s fault," it was "[C.A.] who had said something," and "[h]e didn't say anything." CP at 804.

Ms. Chavez transported both children to the Department's office. CP at 805. The drive from the school to the Department lasted between 10 to 15 minutes. CP at 805. As Ms. Chavez drove the children back to her office, seated in the backseat of the vehicle, C.A. and K.A. exhibited varying emotions; they were quiet and crying. CP at 805.

Once they arrived at the Department, Ms. Chavez escorted C.A. and K.A. to the children's area where they could watch movies and play with toys. CP at 805-06. Ms. Chavez

immediately pulled C.A. aside to try to calm him given that he was visibly upset, shaken, and crying. CP at 806-07. Ms. Chavez asked C.A. basic questions to help calm him down and had a casual conversation with him. CP at 806-07, 1053, 1055, 1083-84. C.A. then spontaneously recounted the details of what happened again and said, "you have to be careful of what you say" or else he'll "end up in a situation like this" and end up being "taken away." CP at 807-08. C.A.'s statements regarding K.A.'s injuries were consistent throughout Ms. Chavez's investigation. CP at 893-94, 1045.

During this period, K.A.'s story began to change as to how he came to have the injuries to his face and his story was now consistent with the disclosure C.A. made to Ms. Chavez at school just two hours earlier. CP at 809, 812. K.A. was more lively, comfortable, and talkative when speaking with Ms. Chavez at the office. CP at 811. K.A. said he woke up early before C.A. and was hungry, so he ran to Ms. Lemay's room in hopes that he would get to eat before C.A. CP at 809. Ms. Lemay asked K.A.

and C.A. to "[p]ick a number between one and 100" and whichever guessed closest to her selected number would get to eat first. CP at 810. K.A. lost, so he stomped off to his room and slammed the door behind him. CP at 810. Ms. Lemay entered his room with a belt in her hand, walked over to close the blinds, and struck K.A. repeatedly on his head, butt, and feet. CP at 810. K.A. had difficulty walking and his ears were ringing like a "fire alarm" after being hit in the head with the belt. CP at 810.

After talking with C.A. and K.A., Ms. Chavez took both children to get snacks. CP at 812, 1055. Ms. Chavez then took photographs of K.A.'s injuries to send out to get a medical consult and to aid her investigation in determining whether there should be a founded or unfounded finding. CP at 447-458, 812-13, 820-24. A week after taking the photographs, Ms. Chavez consulted with Dr. Terry to determine whether K.A.'s injuries were more consistent with being hit with a belt or falling from a tree or tripping into a bush, given the concerns she had regarding his injuries. CP at 783, 824. However, after meeting with

Dr. Terry, Ms. Chavez' concerns that K.A.'s injuries were the result of physical abuse did not subside. CP at 878.

Two days after C.A.'s disclosure, and one day after the boys disclosed abuse to Ms. Chavez, K.A. was forensically interviewed at Mary Bridge Children's Hospital in Tacoma. CP at 878-79, 999. During the interview, only the forensic interviewer was present with K.A., but Ms. Chavez observed. CP at 879, 885-86. K.A. was at ease while being forensically interviewed; he answered the questions without hesitation and without pausing between questions. CP at 894. Ms. Chavez noticed K.A. still had faint red markings on his head directly between his eyes and his temple. CP at 881, 884-85. In the forensic interview, K.A. disclosed multiple incidents of physical abuse by Ms. Lemay and he shared the same story regarding wanting to eat breakfast first, guessing a number between one and 100, and stomping off. CP at 888-90. Ms. Lemay then used a leather belt to hit him repeatedly. CP at 890, 1028.

Later that month, on March 28, 2019, the Department issued founded findings of physical abuse as to Ashley Lemay. CP at 217. Ms. Lemay sought agency review of the founded finding, and the Area Administrator upheld the founded finding. CP at 225, 226.

Ms. Lemay requested an administrative hearing. CP at 244. At a prehearing conference, the ALJ found compelling reasons to have K.A. testify and none of the attorneys expressed an intention on calling C.A., K.A.'s brother, as a witness. CP at 137, 150.

The administrative hearing began a year and a half after C.A.'s initial disclosure, on October 19, 2020, and took place over four days. During the hearing, K.A. testified and he promised to be truthful but once again changed his story regarding how he sustained the marks and scratches on his face. CP at 844. He admitted that he told Ms. Chavez that Ms. Lemay hurt him but said he was lying and being untruthful. CP at 845.

He admitted to telling people that Ms. Lemay hit him with the belt but said he was being untruthful. CP at 845.

Ms. Taylor and Ms. Chavez testified to C.A.'s and K.A.'s statements about K.A.'s injuries. CP at 13-15. Ms. Lemay did not object to this testimony from Ms. Taylor or Ms. Chavez. CP at 546-48, 786-91, 793. Neither party called C.A. as a witness. CP at 21 (FOF 4.39).

Various family members, including Jeanine Saunders and Amber Wright, testified regarding C.A.'s general nature and his truthfulness. CP at 1093, 1131-32, 1136, 1147. Ms. Saunders, the children's maternal grandmother, described C.A. as affectionate, a happy-go-lucky child, and someone who is a typical kid. CP at 1095. Ms. Saunders and Ms. Wright both agreed that C.A. is known to be truthful, and when he does lie, the lies are age appropriate. CP at 1131-32. Ms. Wright, maternal aunt, with whom both K.A. and C.A. resided for a couple of months, said that C.A. would tell "some little child simple lies" but "nothing major." CP at 1147.

However, the witnesses provided different testimony regarding K.A. K.A. has a reputation for not telling the truth. CP at 20 (FOF 4.35). This is a recognized behavioral trait for K.A., and no one disagreed with this assessment. CP at 20 (FOF 4.35).

On December 16, 2020, the ALJ affirmed the Department's founded findings in an Initial Order. CP at 67-81. On February 26, 2021, the BOA Chief Review Judge agreed, affirming the Department's founded findings in a Review Decision and Final Order. CP at 11-27.

Ms. Lemay sought judicial review, and the Superior Court affirmed the BOA's Decision and Final Order. CP at 2, 1260. She now appeals the final order to this Court. CP at 1.

IV. ARGUMENT

A. Standard of Review

The Washington Administrative Procedure Act's (APA) judicial review standards govern this appeal. *Tapper v. Emp't Security Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

In review of an administrative decision, the appellate court sits in the same position as the superior court and applies the APA to the record. *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 584-85, 344 P.3d 199 (2015).

The appellant, Ms. LeMay, bears the burden of proof on appeal to demonstrate the decision should be reversed. RCW 34.05.570(1)(a). The reviewing court may grant the appellant relief only if the party demonstrates that one of the following occurred:

> (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
> (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
> (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
> (d) The agency has erroneously interpreted or applied the law;
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

> (f) The agency has not decided all issues requiring resolution by the agency;
> (g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
> (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
> (i) The order is arbitrary or capricious.

RCW 34.05.570(3)(a)-(i).

In summary, a reviewing court may reverse an agency decision when "(1) the administrative decision is based on an error of law; (2) the decision is not based on substantial evidence; or (3) the decision is arbitrary or capricious." *Scheeler v. Dep't of Emp't Sec.*, 122 Wn. App. 484, 487-88, 93 P.3d 965 (2004) (citing *Tapper*, 122 Wn.2d at 402 (citing RCW 34.05.570(3))). Here, Ms. Lemay challenges the agency's decision under all three categories of review of an agency decision. Br. of Appellant at 25, 37, 42.

The agency decision under review in this case is the BOA's decision to affirm Ms. Lemay's finding of physical abuse against K.A. Physical abuse is "the nonaccidental infliction of physical injury or mistreatment on a child that harms the child's health, welfare, or safety." WAC 110-30-0030(1). The Washington Administrative Code provides multiple examples of physical abuse, but includes "[d]oing any other act that is likely to cause and that does cause bodily harm greater than transient pain or minor temporary marks or that is injuries to the child's health, welfare or safety." WAC 110-30-0030(1)(f). Although a parent may physically discipline a child, that discipline may become physical abuse:

> Physical discipline of a child, including the reasonable use of corporal punishment, is not considered abuse when it is reasonable and moderate and is inflicted by a parent or guardian for the purposes of restraining or correcting the child. The age, size, and condition of the child, and the location of any inflicted injury shall be considered in determining whether the bodily harm is reasonable or moderate. Other factors may include the developmental level of the child and the nature of the child's misconduct. A parent's belief that it is

> necessary to punish a child does not justify or permit the use of excessive, immoderate or unreasonable force against the child.

WAC 110-30-0030(2).

The BOA properly upheld the ALJ's finding that Ms. Lemay physically abused K.A. In turn, the superior court properly affirmed the BOA's final order. This Court should also affirm.

B. The Agency Properly Admitted C.A. and K.A.'s Statements about K.A.'s Injuries

The BOA did not commit an error of law in relying on C.A. and K.A.'s hearsay statements by affirming Ms. Lemay's founded finding of physical abuse. In making findings about those statements, the reviewing judge properly considered all the evidence going to their reliability. Further, Ms. Lemay had a full and fair opportunity to contradict the statements. The BOA did not err in its final order.

Reviewing courts review conclusions of law under the error of law standard. *Safeco Ins. Companies. v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984). This standard calls

for de novo judicial review of the administrative decisions and allows the reviewing court to essentially substitute its judgment for that of the administrative determination, but substantial weight is accorded to the agency's view. *Id.* While the reviewing court evaluates the agency's decisions of law de novo, the court also allows substantial deference to an agency's interpretation, particularly in regard to the law involving the agency's special knowledge and expertise. *Univ. of Wash. Med. Ctr. v. Dep't of Health*, 164 Wn.2d 95, 102, 187 P.3d 243 (2008). A reviewing court presumes that the agency decision is correct. *Id*. The challenger carries the burden of showing that the Department misunderstood or violated the law. *Id.* at 103.

Here, in its findings of fact, the BOA carefully reasoned about the reliability of K.A.'s conflicting statements about how he was injured because he has a reputation for being unreliable for the truth. CP at 22 (FOF 4.46). To decide, the BOA evaluated C.A.'s reliability and found that he was reliable because all parties described him to be truthful. CP at 22-23 (FOF 4.47).

Importantly, "[C.A.]'s statement has never changed" and was consistent with the version K.A. stated to CPS and during his forensic interview. CP at 23 (FOF 4.49). Therefore, K.A.'s consistent statements to CPS and the forensic interviewer were the most credible. CP at 23 (FOF 4.50).

Given these credibility findings, the BOA applied hearsay rules and concluded that C.A.'s and K.A.'s hearsay statements were admissible. CP at 25 (Conclusion of Law (CL) 5.5, 5.6).

It is well established that hearsay evidence may be admitted in an administrative hearing so long as "it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." WAC 110-03-0340(2)[3]; RCW 34.05.452(1). An ALJ may base a finding solely on hearsay evidence if "doing so would not unduly abridge the

[3] Ms. Lemay cites Chapter 388-02 WAC for administrative hearsay rules. Br. of Appellant at 25, 35. These are incorrect citations. Chapter 388-02 WAC applies to the Department of Social and Health Services. In contrast, Chapter 110-03 WAC applies to the Department of Children, Youth, and Families, the agency that made the decision here.

parties' opportunities to confront witnesses and rebut evidence." RCW 34.05.461(4). The mere fact that the BOA relied on hearsay testimony in upholding an agency decision does not render the hearsay evidence improper because such hearsay evidence "is not necessarily untrustworthy." *In re Discipline of Kronenberg,* 155 Wn.2d 184, 193, 117 P.3d 1134 (2005), (quoting *Chmela v. Dep't of Motor Vehicles*, 88 Wn.2d 385, 392, 561 P.2d 1085 (1977)).

The BOA reviewing judge applied each of these rules to the children's testimony. As to C.A., the BOA concluded that reasonably prudent persons would rely on C.A.'s statements because they were spontaneous, provided to a non-interested third party, and C.A. had no reason to be untruthful. CP at 25 (CL 5.6). C.A.'s statements remained consistent throughout the investigation, and were consistent with the version of events that K.A. told CPS and at his forensic interview. CP at 23 (FOF 4.49). Further, nothing prevented Ms. Lemay from calling C.A. as a witness, but she chose not to do so; indeed, she was

represented by counsel and had a full opportunity to present her theory of the case. Ms. Lemay's argument that the BOA did not properly consider C.A.'s reliability misses a key point—she *agreed* C.A. was generally truthful, as the BOA judge found in two findings that Ms. Lemay has not challenged on appeal, making them verities. Br. of Appellant at 28; CP at 21, 22 (FOF 4.38, 4.47); *Neravetla v. Dep't of Health*, 198 Wn. App. 647, 666, 394 P.3d 1028 (2017) (final order findings to which the appellant does not assign error are verities on appeal). Thus, the BOA properly applied both WAC 110-03-0340 and RCW 34.05.452 to C.A.'s statements based on the record before it.

Likewise, as to K.A., the BOA concluded that his hearsay statements were properly considered because he testified at the hearing and Ms. Lemay had an opportunity to cross-examine the child. CP at 25 (CL 5.5). The BOA found K.A.'s statements to CPS and the forensic interview the most credible because they matched C.A.'s statements, who is reliable for telling the truth.

CP at 22-23 (FOF 4.47, 4.50). In fact, the BOA reviewing judge declined to make a finding about a different incident with a walkie talkie *because* K.A.'s statements lacked any other mark of reliability. CP at 27 (CL 5.9). Ms. Lemay cannot show that the BOA committed an error of law in relying on K.A.'s hearsay statements that Ms. Lemay physically abused him by hitting him with a belt that caused more than transitory pain.

Importantly, the appellate court does not reweigh the evidence or reexamine credibility determinations. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). Ms. Lemay assigns error to Finding 4.50, which is explicitly a credibility determination that K.A.'s statements to Ms. Chavez and at his forensic interview are the most credible because they "match and complement" C.A.'s statements. CP at 23 (FOF 4.50). To the extent her argument relies on countering this credibility finding, this Court should disregard it.

Ms. Lemay relies on inapplicable hearsay rules to support her argument on appeal. RCW 9A.44.120 pertains to statements

about child sexual abuse in the context of "dependency proceedings under Title 13 RCW and criminal proceedings," not administrative proceedings. And these children's statements pertained to physical abuse, not sexual abuse.

The additional factors outlined by Ms. Lemay specifically pertain to the criminal setting. Br. of Appellant at 26-28. Only one case has applied these factors to the administrative context. *See Fettig v. Dep't of Soc. & Health Servs.*, 49 Wn. App. 466, 744 P.2d 349 (1987). *Fettig* is inapplicable here for two reasons. First, *Fettig* pertained to child hearsay statements about child sexual abuse, in contrast to this physical abuse case. *Id*. at 473-74. Second, the child victim in *Fettig* did not testify at the hearing. *Id.* at 473. Here, K.A., the victim of abuse, testified; and the BOA used C.A.'s statements to determine which version of events that K.A. provided was credible—the version told during the investigation or the version told at the hearing. CP at 22, 25 (FOF 4.45, CL 5.6). The BOA did not use C.A.'s

statements, standing alone, as proof of Ms. Lemay's physical abuse. *See* CP at 24-26 (CL 5.4-5.8).

But even if the Fettig factors applied here, the BOA explicitly considered them in its ruling on the credibility of C.A.'s statements. Among the non-exhaustive factors considered when determining the reliability of a child's out-of-court declarations include:

> (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declaration and the relationship between the declarant and the witness.

Fettig, 49 Wn. App. at 475 (quoting *State v. Parris*, 98 Wn.2d 140, 146, 654 P.2d 77 (1982)). The *Fettig* court held that additional factors to consider include whether:

> (1) the statement contains no express assertion about past fact; (2) cross examination could not show the declarant's lack of knowledge; (3) the possibility of the declarant's faulty recollection is remote, and (4) the circumstances surrounding the statement . . . are such that there is no reason to

> suppose the declarant misrepresented defendant's involvement.

Fettig, 49 Wn. App. at 475 (citing *State v. Ryan*, 103 Wn.2d 165, 176, 691 P.2d 197 (1984)).

The BOA final order demonstrates that the review judge adequately considered these factors. As to spontaneity, Ms. Taylor asked C.A. if he was okay, not to inquire about abuse, but generally as to the child's well-being after he appeared nervous that day. CP at 13 (FOF 4.5). Later, C.A. volunteered to Ms. Chavez information about the physical abuse at the CPS office. CP at 16-17 (FOF 4.21). Everyone agreed that C.A., who was not the child alleged to have been abused, is generally truthful. CP at 21 (FOF 4.38). The BOA judge stated he considered "the witnesses' motivations, demeanors, and other factors" in making credibility determinations between conflicting testimony. CP at 22 (FOF 4.45). C.A. initially disclosed to Ms. Taylor, a disinterested, third-party mandated reporter, who Ms. Lemay did not allege was biased against her.

CP at 22, 24 (FOF 4.47, CL 5.6). C.A. made his disclosure to Ms. Chavez before the children were ever allegedly alone together to supposedly coordinate stories. CP at 23 (FOF 4.48). C.A.'s statements about the incident were consistent throughout the investigation. CP at 23 (FOF 4.49). Even though the BOA did not cite or rely on *Fettig* as authority in the final order, the review judge explicitly considered many of them.

That Ms. Lemay disagrees with the BOA's assessment of C.A.'s reliability on appeal does not make the BOA's final order reversible. Ms. Lemay challenges C.A.'s credibility even though it was undisputed at the hearing that he is truthful. CP at 22 (FOF 4.47). Ms. Lemay could have called C.A. as a witness, but she did not, even though C.A.'s statements and his credibility were clearly at issue during the hearing. *E.g.*, CP at 538. As to K.A., the fact that Ms. Lemay was not successful in rebutting his hearsay is not a basis for overturning the agency's decision. Her suggestions of the children's motivations to lie are purely speculative, and not based upon the BOA's assessment of

credibility. This Court should uphold the agency's application of the hearsay rules in an administrative hearing on child physical abuse. . *Univ. of Wash. Med. Ctr.*, 164 Wn.2d at 102.

C. Sufficient Evidence Supports the BOA's Finding that Ms. Lemay Physically Abused K.A.

The BOA's final decision should be affirmed because substantial evidence supports the reviewing judge's findings of fact, which in turn support its conclusions of law.

A reviewing court will uphold an agency's findings of fact if they are supported by evidence that is substantial when viewed in light of the whole record. *Bond v. Dep't of Soc. & Health Servs.*, 111 Wn. App. 566, 571-72, 45 P.3d 1087 (2002). If the evidence is sufficient from which a reasonable person could make the same finding as the agency, the agency's finding should be upheld. *Terry v. Emp. Sec. Dep't,* 82 Wn. App. 745, 748-49, 919 P.2d 111 (1996).

The substantial evidence standard is "highly deferential" to the agency fact finder. *ARCO Prods. Co .v. Wash. Utilities & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995).

An agency's factual determinations should not be overturned unless "they are clearly erroneous," and the Court is "definitely and firmly convinced that a mistake has been made." *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004) (citing *Schuh v. Dep't of Ecology*, 100 Wn.2d 180, 183, 667 P.2d 64 (1983) (quoting *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994)).

In reviewing findings of fact, courts view the evidence in the light most favorable to the prevailing party below. *McGuire*, 144 Wn.2d at 652 (citation omitted). Further, appellate courts must accept the fact finder's credibility findings and weight determinations for reasonable but competing inferences. *Id*.

Significantly, Ms. Lemay does not challenge many of the agency's findings that satisfy the definition of physical abuse under WAC 110-30-0030(1). She does not challenge the findings about what K.A. reported to Ms. Chavez and during the forensic interview. CP at 17-18 (FOF 4.22, 4.26). K.A. reported that Ms. Lemay hit him on his head, behind, and feet with a belt.

CP at 17-18 (FOF 4.22, 4.26). He could not walk afterward and had ringing in his ears. CP at 17-18 (FOF 4.22, 4.26). Days later, K.A. still had marks on both sides of his face and on his hairline. CP at 14 (FOF 4.12). C.A. reported that Ms. Lemay had entered K.A.'s room with a belt, and afterwards he had marks on his face. CP at 15 (FOF 4.14). All of these findings satisfy the conclusion that Ms. Lemay went beyond reasonable corporal punishment because her reaction to K.A.'s behavior that morning were not proportional to his yelling and slamming a door. CP at 26-27 (CL 5.8). Further, the marks on his face were more than transitory and he had difficulty walking and he had ringing in his ears. CP at 26-27 (CL 5.8). This evidence satisfies the definition of physical abuse, and Ms. Lemay does not claim that it does not. WAC 110-30-0030(1), (2).

Instead, Ms. Lemay relies on her argument that the BOA could not rely on the children's hearsay statements. As explained above, the hearsay statements from the children were properly admitted and the reviewing judge was entitled to rely on them.

Thus, Ms. Lemay cannot show that insufficient evidence supports the founded finding against her.

On appeal, Ms. Lemay attempts to interject a rule to the substantial evidence standard that would require medical evidence to find physical abuse. Br. of Appellant at 40-42. Neither the substantial evidence standard of review, nor the definition of physical abuse, requires evidence from a medical provider before finding a parent physically abused a child.

Ms. Lemay also attacks the BOA's finding of fact 4.48, which found that the children did not have time to discuss or coordinate the events in question in the context of analyzing K.A.'s credibility. Br. of Appellant at 38. However, she overlooks three points. First, Ms. Lemay does not assign error to finding 4.24, which also found that the children did not have time to "match their stories" from the time they left their school to the time K.A. disclosed abuse to Ms. Chavez. Br. of Appellant at 3-4; CP at 18 (FOF 4.24). Therefore, finding 4.24 is a verity on appeal. *Neravetla*, 198 Wn. App. at 666. Finding 4.24 is

repetitive of finding 4.48, except that the reviewing judge in 4.48 used the lack of time to coordinate as an additional reason to give weight to K.A.'s disclosure of abuse. CP at 23 (FOF 4.48). Second, in pitting finding 4.48 against finding 4.20, which found that the children were in the same room together and had a short conversation that Ms. Smith overheard, Ms. Lemay omits a key fact from Ms. Smith's observation: she was present with them in the room. CP at 651. Thus, they were not alone when they spoke to each other. Thirdly, Ms. Lemay attempts to disprove finding 4.48 with a negative, the *lack* of evidence of what the children talked about at home, for example. Br. of Appellant at 39. But disproving a negative is not the substantial evidence standard. There is no evidence that K.A. and C.A. had any time alone together to "match their stories." CP at 18 (FOF 4.24).

Given C.A.'s and K.A.'s disclosures, substantial evidence supports the agency's finding that Ms. Lemay abused K.A. Although the BOA found that K.A. had hurt himself in the past, his behavior in the past does not negate the BOA's weight and

credibility determinations on the children's disclosures. CP at 20 (FOF 4.35). Ms. Lemay herself did not have an explanation of how K.A. was injured, and she dismissed K.A.'s statement that he was injured after falling out of a tree. CP at 18, 20 (FOF 4.27, 4.34). The superior court's order affirming the BOA's review decision should be affirmed.

D. The Agency's Decision is not Arbitrary or Capricious

Because the BOA properly considered the children's hearsay statements and carefully weighed competing testimony about what happened to K.A., Ms. Lemay cannot meet her burden to demonstrate the agency's decision was arbitrary or capricious.

The scope of review under applying the arbitrary and capricious test is a narrow standard and the one asserting it "must carry a heavy burden." *Pierce Cty. Sheriff v. Civil Service Comm'n of Pierce Cty.*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). To find a decision arbitrary or capricious, it must have been a "willful and unreasonable disregard to the facts and

circumstances." *Univ. of Wash. Med. Ctr.*, 164 Wn.2d at 102; *Wash. Indep. Tel. Ass'n v. Wash. Utilities & Transp. Comm'n*, 148 Wn.2d 887, 904, 64 P.3d 606 (2003). "Where there is room for two opinions, [an] action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached." *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 609, 903 P.2d 433 (1995) (citation omitted). Under this test, a court "will not set aside a discretionary decision [of an agency] absent a clear showing of abuse." *ARCO Prods. Co.*, 125 Wn.2d at 812.

The BOA did not disregard facts, and here Ms. Lemay does not argue that the reviewing judge *overlooked* any specific fact that would warrant reversal. Rather, her argument emphasizes a disagreement with the ruling's weight of the evidence. The agency found that K.A. has a reputation for being untruthful, and so the reviewing judge needed to examine the record to choose between conflicting testimonies about what caused K.A.'s injuries. CP at 20, 22 (FOF 4.35, 4.45, 4.46). In contrast, all parties consider C.A. to be truthful, and he reported

that Ms. Lemay caused K.A.'s injuries with a belt. CP at 22 (FOF 4.47). This evidence was well-within hearsay rules, as discussed above. Thus, the reviewing judge found that K.A.'s statements to Ms. Chavez and during his forensic interview were most credible because they "most closely matched and complemented" C.A.'s statements. CP at 23 (FOF 4.50).

This process did not "cherry pick" facts to the exclusion or ignorance of other facts. Br. of Appellant at 43. The reviewing judge engaged in a careful examining of all the facts before making its credibility determinations. These weight and credibility issues are beyond the reach of the appellate court. *McGuire*, 144 Wn.2d at 652. Ms. Lemay believes that the agency should have weighed the facts differently and ruled in her favor, but such a belief is not sufficient to demonstrate arbitrary or capricious action. *Heinmiller*, 127 Wn.2d at 609. The BOA did not willfully or unreasonably disregard any fact or circumstance, and its decision was not arbitrary or capricious.

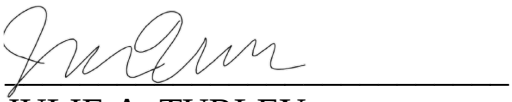
V. CONCLUSION

For the reasons stated above, the Department respectfully requests that the superior court order upholding the Department's decision be affirmed.

This document contains 6,292 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 19th day of August, 2022.

ROBERT W. FERGUSON
Attorney General



JULIE A. TURLEY
Assistant Attorney General
WSBA #49474

DECLARATION OF SERVICE

I, Kim Wilcox, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

On August 19, 2022, I caused a true and correct copy of the Answer to Motion for Discretionary Review by the Respondent, Department of Children, Youth, and Families, to be filed electronically with the Court of Appeals, Division II, and to be served on the parties electronically through the Court's filing system.

SIGNED in Tacoma, Washington, this 19th day of August, 2022.

KWilcox

Kim Wilcox
Legal Assistant

ATTORNEY GENERAL OF WASHINGTON - TACOMA SHS

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